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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1942

WILLIAM L. MURRAY, as Agent for and on Behalf of JAMES REDDICK, and Others Similarly Situated, *Petitioner*, vs. NOBLESVILLE MILLING COMPANY, a Corporation, *Respondent.*	No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petitioner, William L. Murray, as agent for and on behalf of James Reddick and others similarly situated, respectfully shows to the Court:

SUMMARY STATEMENT OF MATTERS INVOLVED

The petitioner's complaint (R. 2-6), filed March 10, 1941, in the Circuit Court, Hamilton County, State of Indiana,

under Section 16 (b) of the Fair Labor Standards Act of 1938, alleged that the petitioner was the duly authorized agent of the employees named in the complaint, that the respondent had employed said employees in the production of goods for commerce and owed them unpaid overtime compensation, plus equal amounts as liquidated damages and reasonable attorney's fees and costs. The respondent, having removed the case to the United States District Court for the Southern District of Indiana (R. 1), filed its answer denying violations of the Act (R. 7-11).

The District Court found that the respondent's arrangement of October 18, 1938, placed in issue by the complaint and answer, was not a bona fide contract and was considered by respondent as merely a bookkeeping system, that the employees after October 18, 1938, did not know exactly how to figure their pay and considered that it remained unchanged (R. 51), and concluded that the petitioner was entitled to the judgment prayed for (R. 51). The United States Circuit Court of Appeals for the Seventh Circuit, held that the case was governed by *Walling v. Belo Corp.*, 316 U. S. 624, that the employees who were in respondent's employ on October 18, 1938, agreed on that date to a reduction in their rate of pay, and as to those employees together with three others subsequently employed, reversed the judgment of the district court, (R. 71-74).

OPINIONS BELOW

The opinion of the District Court (R. 45-51) is reported in 42 Fed. S. 808. The opinion of the Circuit Court of Appeals (R. 67-75) is reported in 131 F. (2d) 470.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as Amended by the Act of

February 13, 1925, C-229 (43 Stat. 938; 28 U. S. C. Sec. 347). The decree of the Circuit Court of Appeals on the merits was entered on November 25, 1942, and this petition for certiorari was filed before the expiration of three (3) months from said date.

QUESTIONS PRESENTED

1. Prior to October 24, 1938, the effective date of the Fair Labor Standards Act, an employer was paying its employees engaged in the production of goods for commerce wages at the rate of 40 cents an hour with a usual workweek of 60 hours. On October 18, 1938, it advised them that when they worked over 40 hours a week, it would calculate their pay on a basis of 34 cents for the first 40 hours a week and 51 cents an hour for the hours in excess of 40, and pay a bonus to bring the total pay up to what they would have received at the rate of 40 cents an hour. The question is whether this arrangement satisfies the requirements of Section 7, of the Fair Labor Standards Act.

2. Does an arrangement such as described under "1" above come within the rule laid down by this Court in *Walling v. Belo Corp.*, 316 U. S. 624?

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act of 1938, are set forth in the appendix.

STATEMENT OF FACTS

Prior to October 24, 1938, the effective date of the Fair Labor Standards Act of 1938, the respondent was engaged in the operation of a flour mill (R. 15) at Noblesville, Indiana. This operation continued until about February 21, 1941, when the plant was sold and operations ceased (R. 32).

The employees here involved, with the exception of five who were employed later (R. 15) and two of whom the Circuit Court of Appeals held were entitled to recover from respondent, were in the employ of respondent during all of the time mentioned herein. It was customary for respondent to work its employees about 60 hours each week (R. 32) and they were paid 40 cents an hour straight time except that some of them received a slightly higher rate (R. 43).

On October 18, 1938, the respondent, in anticipation of the Fair Labor Standards Act (R. 32, 42, 43) called a meeting at which all its employees attended except one, to discuss its future policy concerning said Act (R. 17). Respondent by its secretary-treasurer, Don Jenkins, advised its employees that they would not receive a raise in wages on account thereof (R. 22) but that it had figured out a method whereby the employees could still receive the same amount of money for the same amount of work (R. 18, 23, 27, 32), which plan was, in the case of a 40 cent per hour employee, to reduce the existing rate to 34 cents an hour (R. 18) pay overtime based thereupon at 51 cents an hour and in the event the sum thus received did not equal the total amount the employee had formerly received, to add a "bonus" or "gratuity" sufficient to equalize his hourly rate of pay with that which he had formerly received (R. 32, 33, 34).

In theory this plan applied to all employees except two, who were considered by respondent to be retail salesmen engaged in intrastate commerce, whether they had formerly worked for more or less than 40 cents an hour (R. 27). Respondent in addition to disclosing its plan, told its employees that it would go immediately to 40 hours in calculating the overtime pay, disregarding the 44 and 42 hourly maximum established under Section 7 (a) (1) and (2) of the

Act (R. 32) and that it would in all instances, where the employee worked less than 40 hours in any work week, pay such employee 40 cents an hour (R. 18, 21, 23, 25). Respondent advised them further that under the plan as thus set up, it could work them for 60 hours at 40 cents an hour (R. 23), that it wouldn't make any difference as to the hourly rate of the employees (R. 23), that it wasn't interested in the hourly rate except that it came within the minimum provided for in the Act (R. 38) and that its plan was merely a matter of bookkeeping (R. 32, 43). Respondent instructed the employees to refrain from telling anyone what wages they were receiving, but if anyone should inquire they were told to advise them that their rate of pay was 40 cents an hour and time and one-half for overtime (R. 18, 23, 24).

In concluding the meeting Fred Atkins, grain superintendent of respondent company (R. 20) asked John Williams an employee to rise and give Jenkins a vote of thanks for the trouble he had gone to, Williams refused (R. 18) and thereupon Atkins made a motion for all employees in favor of letting Jenkins take care of it, "stand up," which they did as they wanted to get out and go home (R. 21). The employees never understood the plan advanced by respondent (R. 19, 22, 23) but always considered that they continued to receive their old rates of 40 cents an hour (R. 19, 25), and respondent on several occasions thereafter engaged employees and advised them that their hourly rates of pay would be 40 cents an hour (R. 25) although the record of their wages were compiled in the same manner as other employees. (See Exhibit 1, of Stipulation No. 1.)

In substance the plan proposed by the respondent was that the pay of the employees for the hours up to 40 a week should be calculated at the rate of 34 cents an hour, with pay for hours in excess of 40, at 51 cents an hour, and that in addition to the pay so calculated, the employees would

receive a "bonus," so that the total money they received each week would equal 40 cents an hour, which was the rate at which they had been paid before October 18, 1938. The Respondent's plan did not include any guarantee of a weekly minimum amount, but the employee was paid according to the number of hours worked, 40 cents an hour for each hour up to 61 a week.

Thereafter Jenkins made an entry in the weekly time book of respondent with reference to the change in the employees base rate of pay (R. 40) and thereupon revised its bookkeeping system (R. 15) to reflect its new system, a typical example of which is as follows:

1938		Mack Cook	Total Hrs.	Base Hrs.	Rate	Base Total	Over Time Hrs.	Over Time Rate	Over Time Total	Bonus	Total Labor	Old Age	Check
Oct.	21	"	30	30	.34	10.20	....	.51	.....	1.80	12.00	.12	11.88
"	28	"	46	40	"	13.60	6	"	3.06	1.74	18.40	.18	18.22
Nov.	4	"	75	40	"	13.60	35	"	17.85	.....	31.45	.31	31.14
"	11	"	60	40	"	13.60	20	"	10.20	.20	24.00	.24	23.76
"	18	"	60	40	"	13.60	20	"	10.20	.20	24.00	.24	23.76
"	25	"	21	21	"	7.14	....	"	.....	1.26	8.40	.08	8.32
Dec.	2	"	50	40	"	13.60	10	"	5.10	1.30	20.00	.20	19.80
"	9	"	60	40	"	13.60	20	"	10.20	.20	24.00	.24	23.76
"	16	"	40	40	"	13.60	....	"	.....	2.40	16.00	.16	15.84
"	23	"	15	15	"	5.10	....	"	.....	.90	6.00	.06	5.94

(R. 16)

Respondent proceeded to keep its books in the above manner as shown by Exhibit 1, attached to stipulation 1, (R. 16), but furnished its employees each week a social security slip showing only the date of the pay period, the days worked, amount of salary, total earnings, deduction for old age benefits and the net amount paid (R. 19) which in all instances under 61 hours would equal 40 cents an hour (R. 19).

REASONS FOR GRANTING THE WRIT

1. The holding of the Circuit Court of Appeals that for purposes of Section 7 of the Fair Labor Standards Act the "regular rates" of the employees were the rates of 34 cents an hour under the alleged pay arrangement of October

18, 1938, although the employees' actual compensation for hours worked up to 61 a week was 40 cents an hour is probably erroneous under the rule laid down by this Court in *Overnight Motor Co. v. Missel,* 316 U. S. 572, and applied by this Court in *Warren-Bradshaw Co. v. Hall,* 63 Sup. Ct. 125, and *Floyd v. DuBois Soap Co.,* 63 Sup. Ct. 159. These cases dealt with the application of Section 7 to employees paid, respectively, a fixed weekly salary for a varying number of hours per week, a fixed daily wage, and a fixed weekly wage for a regular and unvarying number of hours per week. In the *Missel* case this Court held that the words "regular rate at which he is employed" in Section 7 mean the employee's actual hourly rate of earnings, determined for each week by dividing the amount of his wage by the number of hours worked, and that compliance with the Act requires that for each hour in excess of the statutory maximum the employee be compensated at not less than 150 per cent of such "regular rate." The opinion in the *Missel* case also points out the substantial similarity between the employee who is paid by the hour and the employee who is paid a fixed weekly wage for regular contract hours which are the actual hours worked. And see, *Bumpus v. Continental Baking Co.,* (C. C. A. 6), 124 F. (2d) 549; certiorari denied 316 U. S. 704.

The employees concerned in this petition were hourly rate employees, both before and after the alleged "pay arrangement" of October 18, 1938. Up to 61 hours a week the pay they received varied in direct proportion to the number of hours worked. When a typical employee worked 15 hours a week, his pay was $6, 30 hours, $12, and 60 hours, $24 (R. 16) and his per hour rate of earnings was 40 cents an hour, and that rate was "the regular rate at which he was employed." *Overnight Motor Co., v. Missel,* 316 U. S. 572.

These employees had no fixed weekly salaries, paid regardless of the number of hours worked, and no *weekly* amount was guaranteed. In this respect the present case is clearly distinguishable from *Walling v. Belo Corp.*, 316 U. S. 624. The employees in the *Belo* case received weekly guaranties or salaries for any number of hours up to 54½ per week, during the first year, so they were assured a regular weekly income even in weeks when work was slack. The employees in the present case had no such security. The *Belo* case held that the "regular rate" of a weekly paid employee may be fixed by contract at a rate lower than his actual hourly earnings for some weeks, but it did not hold it is submitted, that the "regular rate" of a 40 cent an hour employee may be "fixed" at 34 cents for purposes of Section 7, while the employee is still paid 40 cents for each hour.* Nor were there in the present case, as the lower Court found in the *Belo* case (316 U. S. pp. 629-630) "actual bona fide contracts of employment" which "were intended to, and did, really fix the regular rates at which each employee was employed." In this case the District Court which heard the witness found that the employees considered that their pay remained unchanged after October 18, 1938, and that the respondent considered the arrangement of that date to be merely a bookkeeping system (R. 51). If there was any "contract" on October 18, 1938, it was not a contract to fix the rates of pay at 34 cents an hour, but one to divide the former rate of 40 cents an hour into 34 cents an hour and a "bonus" with no change in the actual per hour compensation of the employee.

2. The decision below is in conflict with the decision of

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* The present case does not involve a real reduction in the rate of pay, such as was found in *White v. Witwer Grocer Co.*, 5 Wage hour Rept. 1007 (Dec. 11, 1942, C. C. A. 8), and *General Mills, Inc. v. Williams*, 6 Wage Hour Rept. 19 (Dec. 16, 1942, C. C. A. 6). In these cases there was no guaranty or other device to continue the former hourly rate.

the Circuit Court of Appeals for the Eighth Circuit in *Carleton Screw Products Co., v. Fleming,* 126 F. (2d) 537, certiorari denied 63 Sup. Ct. 54. That case like the present dealt with hourly paid employees and the facts were strikingly similar to the facts in the present case. The Carleton Screw Products Company in anticipation of the Fair Labor Standards Act likewise purportedly "agreed" with its employees upon hourly rates of pay 10 cents lower than the hourly rates they received before the effective date of the Act, and as part of the arrangement each employee was paid overtime compensation at one and one-half times his new "agreed" rate and a "bonus" sufficient to bring his weekly pay up to the amount he would have received for the same number of hours at his old hourly rate. The Circuit Court of Appeals for the Eighth Circuit held that the "regular rates" of the employees were the hourly rates they were actually paid for each hour and not the "agreed" rates, and that the so-called "bonus" was a part of the employee's regular compensation on which the time and one-half for over-time must be based. The decision of the Eighth Circuit in the *Carleton Screw* case and the decision of the Circuit Court of Appeals in the present case appear to be irreconcilable as to the "regular rate" of an employee who receives a guaranteed hourly rate made up of an agreed hourly rate plus a bonus.

3. The determination of the questions herein presented involve the substantial interests of employee rights to overtime compensation pursuant to the provisions of Section 7, of the Fair Labor Standards Act. At the time of the effective date of the Fair Labor Standards Act, many and devious ways were devised by employers generally throughout the country employing large numbers of employees, for the purpose of avoiding obligations under the Act. The purported scheme of the respondent company was one such

devise in avoidance of such obligation, and the employees herein involved represent only a small group of numerous employees of employers generally, as to whom the obligations of the statute with respect to overtime were thus avoided, and if the opinion of the Circuit Court of Appeals of the Seventh Circuit is allowed to stand it will result in an unequal administration of the law.

CONCLUSION

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 7996, William L. Murray, as Agent for and on behalf of James Reddick, and others similarly situated, Plaintiff-Appellee vs. Noblesville Milling Company, a Corporation, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the portion of said judgment of said Circuit Court of Appeals, to which this writ is directed, be reversed by the Court, and for such further relief as to this Court may seem proper.

FRANCIS E. THOMASON,
Counsel for Petitioner.

Dated, February 8, 1943.